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In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD W. FAUSNER AND ANITA C. FAUSNER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners seek review of the dismissal of their appeal on the ground that their notice of appeal had not been timely filed.

The pertinent facts are as follows: Petitioners commenced this proceeding in the United States Tax Court seeking redetermination of deficiencies in their federal income taxes for 1973 and 1974 resulting from the Commissioner's disallowance of certain deductions claimed for commuting expenses.[1] The Tax Court entered its decision upholding the Commissioner's determination on August 30, 1979 (Pet. Supp. App. 1-9). Petitioners'

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[1]Petitioners are the same persons who were involved in *Fausner* v. *Commissioner*, 413 U.S. 838 (1973), and the substantive tax issue in the present litigation is similar to the one considered in the earlier case by this Court.

attorney thereafter attempted to perfect an appeal from that decision by mailing a notice of appeal to the Tax Court (Pet. App. 29). The Tax Court received the notice on December 3, 1979, which was more than 90 days after the date of the decision. The envelope in which the notice of appeal was mailed bore both a private postmark date of November 28, 1979, the 90th day after the Tax Court decision, and a United States Postal Service postmark date of November 29, 1979, the 91st day after that decision. The court of appeals concluded that the notice of appeal was untimely and accordingly dismissed the appeal for lack of jurisdiction (Pet. App. 27-28).

1. The decision below correctly dismissed petitioners' appeal. Section 7483 of the Internal Revenue Code of 1954 (26 U.S.C.) provides that review of a decision of the Tax Court may be obtained by filing a notice of appeal with the clerk of that court within 90 days after the decision is entered. Under Section 7502(a) of the Code, however, a notice of appeal which is received after the expiration of that time may nevertheless be considered to have been timely filed where the cover in which it was mailed bears a United States postmark showing a date within the prescribed 90-day period. Under Section 7502(b), this rule may also apply in the case of private postmarks, but only to the extent expressly allowed by regulation. Section 301.7502-1(c)(1)(iii)(a) of the Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.) specifically provides that, if the United States Post Office postmark shows a date after the prescribed due date, the document is not considered to be timely filed, regardless of when it was deposited in the mail. Section 301.7502-1(c)(1)(iii)(b) of the Regulations further provides that if the envelope for the document discloses both a private postmark and a United States Post Office postmark, the private postmark is to be disregarded.

Since the Postal Service postmark on the envelope in which petitioner's notice of appeal was mailed was dated November 29, 1979, the 91st day after entry of the Tax Court decision, the notice of appeal was not timely filed under either Section 7502(a) or the Regulations under Section 7502(b). The late filing of a notice of appeal therefore deprived the court of appeals of jurisdiction to review the decision of the Tax Court (*Vibro Mfg. Co.* v. *Commissioner*, 312 F. 2d 253 (2d Cir. 1963)).

2. Petitioners argue (Pet. 9-23) that the dismissal of their appeal for a late filing denies them equal protection and due process of law, and consequently that the late filing here should not be treated as depriving the court of appeals of jurisdiction. Petitioners observe (Pet. 10) that notice of the entry of a Tax Court decision is transmitted to a taxpayer by mail and that mail from Washington, D.C. may require a longer time to reach West Coast destinations than it does to reach other destinations. They argue (Pet. 10-11) that West Coast residents may thus have less time in which to perfect an appeal than residents of other areas. The allowance of a lesser amount of time, they assert (Pet. 9-18), violates their right to due process and equal protection. Petitioners also argue (Pet. 18-23) that the Tax Court is not required by statute to provide notice of entry of a decision, and that, consequently, any notice provided is casual or as a matter of favor, and therefore in derogation of the requirements of due process.

But the record reveals and petitioners admit (Pet. 6) that they received notice of the Tax Court's decision within four days of its entry and, thus, had 86 days in which to file a timely notice of appeal. Cf. *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 246 (1944). For the Equal Protection Clause to be violated by a particular practice required by rule in the taking of an appeal, the rule must bring about an unreasoned discrimination impeding or

limiting the prejudiced party's access to the appellate court. See, *e.g.*, *Blackledge* v. *Perry*, 417 U.S. 21, 25 n.4 (1974); *Lindsey* v. *Normet*, 405 U.S. 56 (1972); *Williams* v. *Oklahoma City*, 395 U.S. 458, 459 (1969). As the facts of this case demonstrate, any difference in the time available for residents of the West Coast and residents of other areas to take an appeal is insubstantial and does not limit access to the appellate court.[2]

By the same token, having received notice of the Tax Court's decision in ample time to perfect a timely appeal, petitioners are in no better position to raise a serious question as to the adequacy, for purposes of the Due Process Clause, of the notice procedures followed by the Tax Court. Cf. *Drawdy Investment Co.* v. *Leonard*, 261 F. 2d 226, 228-229 (5th Cir. 1958). Even though not required by statute, it is the practice of the Tax Court to send all parties formal notice of the entry of decision, and it followed that practice here. There is accordingly no basis for petitioners' contention (Pet. 10, 20-23) that the Tax Court's notice of the adverse decision was merely "casual" or "a matter of favor."[3]

Indeed, the Federal Rules of Civil Procedure have long provided that failure of the clerk of a district court to give notice of an adverse judgment does not affect the normal running of the time for filing notice of appeal. Fed. R.

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[2]The drafting of a notice of appeal and its mailing hardly require an inordinate effort over a long period of time. Cf. *Lindsey* v. *Normet*, *supra*, 405 U.S. at 65; *Johnson* v. *Railway Express Agency, Inc.*, 489 F. 2d 525, 530 (6th Cir. 1974).

[3]*Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915), upon which petitioners rely (Pet. 22-23), is distinguishable. There, the governmental authority did not provide notice of the actions in question as a matter of practice.

Civ. P. 77(d). The constitutionality of that provision has never been doubted. As the Second Circuit observed in *Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81, 82-83 (1960), Rule 77(d) simply makes it incumbent on the individual litigant and his attorney to follow the process of the litigation and to apprise themselves of any judgment entry that might be made. Here, of course, petitioners and their attorney were apprised by the Tax Court itself of the adverse decision in sufficient time to file a notice of appeal, but simply failed to do so.

3. Petitioners also contend (Pet. 24-26) that Rule 26(c) of the Federal Rules of Appellate Procedure applies to the filing of a notice of appeal from a Tax Court decision so as to give them an extra three days in which to mail their notice of appeal. That rule, however, is inapplicable on its face. It provides: "Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period." A person seeking to appeal a Tax Court decision is not permitted or required to file the notice within a prescribed period from the service on him of a paper. Rather, he is required to act within a prescribed time from the entry of the Tax Court's decision. Consequently, the provision of Rule 26(c) pertaining to actions taken after the service of papers does not enlarge the time in which petitioners may file their notice of appeal. See *Lashley* v. *Ford Motor Co.*, 518 F. 2d 749, 750 (5th Cir. 1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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